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No. 82-1282

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB EDDY, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Reply to Response of Respondent
to Petition for Writ of Certiorari

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REPLY TO RESPONSE OF RESPONDENT
TO PETITION FOR WRIT OF CERTIORARI

On May 12, 1983, Respondent served a response to the Petition for Writ of Certiorari filed in this case as requested by the Clerk of this Court on April 6, 1983. The response dealt solely with a contention by Respondent that "relation back" of the qualification of Respondent as administratrix of the estate of David Milano was permissible under Alabama law. The response to the Petition for Writ of Certiorari wholly misstated Alabama law on this issue.

The Alabama statute applicable to this action under 42 U.S.C. Section 1988 is the Alabama Wrongful Death Statute, Section 6-5-410, Code of Alabama, 1975. None of the cases cited by Respondent in her response were brought under the Wrongful Death Statute. The rule that there can be no "relation back" nor tolling of the time limitation period contained in the Alabama Wrongful Death Statute is unique to wrongful death actions in Alabama and does not apply to other

types of actions brought under Alabama law. The uniqueness of the rule lies in the nature of the time period contained in the Wrongful Death Statute in Section 6-5-410(d). The two year time period contained in Section 6-5-410(d), Code of Alabama, 1975 is not a statute of limitations. McMickens vs. Waldrop, 406 So.2d 867 (Ala. 1981); Downtown Nursing Home vs. Pool, 375 So.2d 465 (1979), cert den., 445 U.S. 930 (1980); Nicholson vs. Lockwood Greene Engineers, Inc., 278 Ala. 497, 179 So.2d 76 (1965). Instead, the two year period contained in the statute is a part of the substantive cause of action itself. As the Alabama Supreme Court recently stated in McMickens vs. Waldrop, supra:

> The law of Alabama for many years has been that the two year period provided for in the Wrongful Death Statute is a part of the substantive cause of action and is not to be treated as a statute of limitations . . . 406 So.2d at 869.

The significance of the distinction is that the two year period in Section 6-5-410 is not, as are statutes of limitations, merely a limitation on the exercise of the remedy. Instead,

the two year time period, being a part of the substantive cause of action itself, is a part of the remedy itself and, after two years, the remedy expires. The distinction was clearly pointed out by the Supreme Court of Alabama in the case of Nicholson vs. Lockwood Greene Engineers, Inc., supra. In that case, the Supreme Court of Alabama was presented with an argument that under the Alabama statute tolling statutes of limitations applicable to claims of minors during the period of their minority[1] the two year time period contained in Section 6-5-410(d) was tolled in wrongful death actions during the period of the minority of a minor wrongful death plaintiff. In rejecting this argument, the Alabama Supreme Court held that because the two year time period in Section 6-5-410(d) is a substantive element of the cause of action itself which simply expires after two years, the limitation period cannot be tolled:

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1 Section 6-2-8, Code of Alabama, 1975

Such action, when brought, must be deemed to arise under the wrongful death statute, [now codified as Section 6-5-410(d), Code of Alabama, 1975] for there can be only one action for wrongful death (citation omitted).

The last sentence of Section 123, supra, reads:

> "Such action must be brought within two years from and after the death of the testator or intestate."

In Louisville and N.R.R. Co. v. Chamblee, 171 Ala. 188, 54 So. 681, it is stated:

> "This period of two years is of the essence of the newly by the statute conferred right of action, and the plaintiff has the burden of affirmatively showing that his action was commenced within the period provided. It is not a limitation against the exercise of the remedy only." (emphasis original).

In Parker v. Fies and Sons, 243 Ala. 348, 10 So.2d 13, it is stated that the two year period provided in the wrongful death statute within which a wrongful death action must be brought "is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof."

Counsel for appellants, plaintiffs below, argue that because of the provisions of Section 36, Title 7, Code of Alabama, 1940, (now Section 6-2-8, Code of Alabama, 1975) the appellant minors should be given the period allowed by law for the bringing of their action after the termination of their disability of nonage.

The fallacy of this argument is that Section 36, supra, relates to statutes of limitation, and not to actions, such as the present one, where the time within which the statutorily created cause of action is fixed in the act creating the right, and is of the essence of the right.

In the absence of a saving clause, expressed or implied, in a wrongful death act creating an otherwise non-existing cause of action, it seems to have been the unanimous view of the courts of our sister states that minority of the plaintiff is not tolled by virtue of the provisions relating to general statutes of limitations wherein such minority does toll the operation of a pure statute of limitations. This for the reason that the time provision within which a wrongful death act is of the essence of the action, and also, such limitation affects the liability itself, and not merely the remedy. (citations omitted).

Because the time period contained in the Wrongful Death Statute is a part of the claim itself, if a wrongful death action is commenced

in Alabama prior to the expiration of the two year period following the death of the decedent by one who is not the "personal representative" of the estate of the decedent, subsequent appointment of the plaintiff as the personal representative following expiration of the two year period does not "relate back" to the commencement of the action. The Alabama Supreme Court has squarely decided this issue in a recent case almost identical to the instant case.

In Downtown Nursing Home, Inc. vs. Pool, 375 So.2d 465 (Ala. 1979), cert. denied, 445 U. S. 930 (1980) an action was brought for wrongful death under § 6-5-410. Suit was filed by the son of the decedent one day short of the expiration of two years from the decedent's death. The plaintiff had, however, never been appointed the executor or administrator of the decedent's estate. An administrator of the decedent's estate was not appointed until almost two and one-half months after the action was brought and well beyond the two year period following the death of the decedent. The

plaintiff in Pool sought to amend the complaint to substitute the administrator as party plaintiff. The trial court allowed the amendment. On appeal the Supreme Court of Alabama reversed. The Alabama Supreme Court held that the wrongful death action was "a nullity" and due to be dismissed because no action had been brought by the personal representative of the estate within two years of the decedent's death. The Court stated as follows:

> Our wrongful death statute, Code 1975, § 6-5-410, in pertinent part provides that:
>
> > (a) A personal representative may commence an action . . . .
> >
> > (d) Such action must be commenced within two years from and after the death of the testator or intestate.
>
> * * *
>
> The statute requires that the action must be brought within two years after the death of the testator or intestate. This two year period is part of the substantive cause of action and is not to be treated as a statute of limitations. The two year period is not a limitation against the remedy only because after two years the remedy expires.

(citations omitted).

* * *

> This Court held that any action by the administrator occurring prior to his appointment was a nullity and therefore there was nothing to which an amendment could relate back.
>
> In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), ARCP, does not apply. 375 So.2d at 466.

The Alabama authorities cited by Respondent in her response to the Petition for Certiorari are wholly inapplicable. The time limitation periods at issue in those cases are mere statutes of limitations only. As shown above, Alabama law is clear that there can be no "tolling" of the substantive time period contained in Section 6-5-410(d) pending the appointment of a personal representative of the estate of a decedent and is equally clear that there can be no "relation back" of the tardy appointment of a personal representative following expiration of the

of the two year period contained in Section 6-5-410(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Royer, Jr., a member of the Bar of the Supreme Court of the United States do hereby certify that on this the 20 day of May, 1983, I did serve copies of this Reply to the Response to the Petition of Certiorari on respondent and upon all other parties separately represented, by placing in the United States Mail, first class postage prepaid, three copies properly addressed to the following counsel of record:

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I further certify that I have served all parties required to be served.

GEORGE W. ROYER, JR.